IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. RAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41964

FILED

AUG 30 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Michael Ray's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On April 2, 2002, the district court convicted Ray, pursuant to a guilty plea, of one count of burglary while in possession of a firearm, and nine counts of robbery with the use of a deadly weapon.[1] The district court sentenced Ray to serve multiple concurrent and consecutive terms totaling fourteen to thirty-five years in the Nevada State Prison. Ray did not file a direct appeal.

On March 26, 2003, Ray filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Ray. On July 28, 2003, the district court

[1]On June 6, 2002, the district court entered an amended judgment of conviction in order to clarify Ray's sentence.

conducted a limited evidentiary hearing. On August 15, 2003, the district court denied Ray's petition. This appeal followed.

In his petition, Ray first raised several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.[2] A petitioner must further establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[3] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[4] The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[5]

First, Ray alleged that his trial counsel were ineffective for refusing to file an appeal, despite a request to do so. "[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal" unless the defendant inquires about a direct appeal or there exists a direct appeal claim that has a reasonable likelihood of success.[6] In Lozada v. State, this

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[2]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

[4]Strickland, 466 U.S. at 697.

[5]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[6]Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

court recognized that "an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."[7] The burden is on the defendant to indicate to his attorney that he wishes to pursue an appeal.[8]

Gregory Denue, Ray's trial counsel at the time he entered his guilty plea, testified during the evidentiary hearing that Ray did not ask for an appeal. Attorney Brent Heggie, who represented Ray at sentencing, also testified that Ray did not request an appeal. Although Ray stated that he inquired about an appeal, the district court determined that Heggie and Denue were more credible witnesses. We conclude that the district court's factual determination was supported by substantial evidence and was not clearly wrong.[9] Consequently, we affirm the order of the district court with respect to this claim.

Second, Ray contended that his trial counsel were ineffective for failing to have the State return his seized Chevrolet Blazer. We conclude that the district court did not err in denying this claim. Attorney Heggie testified during the evidentiary hearing that he attempted to get the Blazer returned, but the State "vehemently" opposed it. Further, even assuming that Ray's trial counsel committed an error with respect to the return of the Blazer, Ray failed to establish that this affected his decision

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[7]110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

[8]Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

[9]See Riley, 110 Nev. at 647, 878 P.2d at 278.

to plead guilty. Therefore, Ray did not demonstrate that his counsel were ineffective on this issue.[10]

Third, Ray claimed that his trial counsel was ineffective for failing to file a motion to dismiss. Specifically, Ray argued that his trial counsel should have filed a motion to dismiss his charges because the witnesses' in-court identification of him was tainted. We conclude that Ray is not entitled to relief on this claim. Ray failed to provide sufficient facts to support his assertion that his in-court identification was tainted,[11] and therefore the district court did not err in denying the claim.

Fourth, Ray contended that his trial counsel was ineffective for failing to investigate a defense. However, Ray failed to articulate what investigation his trial counsel should have conducted, such that he would not have pleaded guilty and would have insisted on going to trial.[12] As such, we affirm the order of the district court with respect to this claim.

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[10]Ray additionally argued that his guilty plea was unknowing and involuntary because the State agreed to return the Blazer as part of the plea agreement, but failed to do so. See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986). There is no support in the record for Ray's contention that the State was to return his Blazer as part of the guilty plea agreement. Further, at the conclusion of the oral plea canvass, Ray questioned the court about the return of his Blazer and the district attorney stated, "I'm going to take no position on that, Judge." For these reasons, Ray did not establish that his guilty plea was unknowing or involuntary due to the State's failure to return his Blazer.

[11]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

[12]See id.; Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

Fifth, Ray claimed that his trial counsel was ineffective for failing to follow up on proper person motions that Ray filed in the district court. The record reveals that Ray filed two proper person motions in the district court: a motion for appointment of effective counsel, and a motion to dismiss the public defender's office. As a result of these motions, the public defender's office was dismissed and Ray was appointed new counsel. Consequently, Ray failed to demonstrate how his counsel was ineffective with respect to these motions. To the extent that Ray's claim involves other proper person motions that his trial counsel refused to file in the district court, we note that Ray failed to provide any facts whatsoever concerning these motions.[13] Thus, the district court did not err in denying this claim.

Next, Ray contended that his guilty plea was not entered knowingly or voluntarily. A guilty plea is presumptively valid, and Ray carries the burden of establishing that his plea was not entered knowingly and intelligently.[14] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[15] This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[16]

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[13]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[14]See Bryant, 102 Nev. at 272, 721 P.2d at 368; Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

[15]State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

[16]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

First, Ray claimed that his guilty plea was not knowingly entered because he believed he was only pleading guilty to two counts of robbery with the use of a deadly weapon. We conclude that this claim is without merit. Ray's guilty plea agreement, which he acknowledged having read, understood, and signed, provided that he was pleading guilty to one count of burglary while in possession of a firearm, and nine counts of robbery with the use of a deadly weapon. Further, during the oral plea canvass, Ray acknowledged the factual basis to support each of the ten counts to which he was pleading guilty. Therefore, Ray failed to establish that under the totality of the circumstances, he was unaware of the charges to which he was pleading guilty, and we affirm the order of the district court with respect to this claim.

Second, Ray argued that his guilty plea was not voluntary because his trial counsel used his wife and child to force him to accept the guilty plea agreement. Ray failed to provide any support whatsoever for this allegation.[17] Moreover, Ray answered affirmatively when asked by the district court whether he signed the agreement freely and voluntarily. Consequently, the district court did not err in denying Ray relief on this claim.

Third, Ray claimed that his guilty plea was not knowingly and voluntarily entered because the State failed to honor the terms of the plea agreement. Specifically, Ray argued that as part of the negotiations, the State agreed to write a letter to the parole board on Ray's behalf.

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[17]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

The record reveals that there were extensive negotiations between Ray and the State concerning his proposed sentence. The State's initial offer was for a total term of imprisonment of between twenty and fifty years. Ray refused the offer because he believed he would not receive parole and would be required to expire his sentence. After further negotiations, the State offered to write a letter to the parole board recommending that Ray be paroled after serving twenty years. Ray still believed that he would be required to expire his sentence, and the two parties continued negotiating. Eventually, Ray agreed to plead guilty in exchange for a term of imprisonment of fourteen to thirty-five years. Neither Ray nor the State mentioned the proposed letter to the parole board in the final negotiations. We therefore conclude that Ray failed to demonstrate the State was obligated to write a letter to the parole board as part of the final plea agreement. As such, Ray did not establish that under the totality of the circumstances, his guilty plea was entered unknowingly or involuntarily, and we affirm the district court in this regard.[18]

Lastly, Ray contended that: (1) the police committed misconduct, (2) the prosecutor committed misconduct, (3) the district court erred in not dismissing his charges, and (4) the district court erred in failing to ensure that he understood the charges to which he was pleading guilty. These claims are outside the narrow scope of claims permissible in

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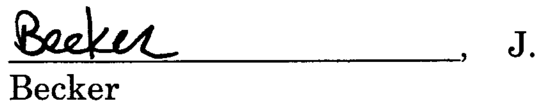
[18]Ray additionally argued that his trial counsel was ineffective for failing to include the letter requirement in the written guilty plea agreement. For the reasons discussed above, we conclude that Ray failed to establish his trial counsel was ineffective on this claim.

a post-conviction petition for a writ of habeas corpus when the conviction is the result of a guilty plea.[19] Thus, we affirm the order of the district court with respect to these claims.

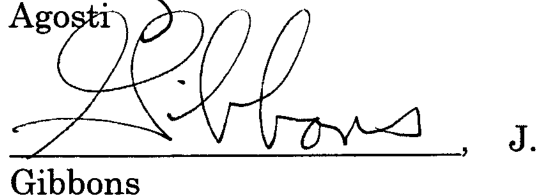
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Ray is not entitled to relief and that briefing and oral argument are unwarranted.[20] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[21]



_______________, J.
Becker

_______________, J.
Agosti



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Gibbons

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[19]See NRS 34.810(1)(a) (providing that the court shall dismiss a post-conviction habeas petition when the conviction is the result of a guilty plea and the petition does not raise a claim that the plea was entered without the effective assistance of counsel, or that the plea was entered unknowingly or involuntarily).

[20]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[21]We have reviewed all documents that Ray has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Ray has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. John S. McGroarty, District Judge
Michael A. Ray
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk